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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LEROY OLSON and CAROLE DAVEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 4a-9a) is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that petitioner Board of Education is not immune from suit under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is an action by seven public school teachers and the Aurora Education Association East ("Association" or "AEAE"), of which the seven teachers are members, against the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois, the members of the Board, and the superintendent of the Aurora public school system.

On June 9, 1971, in the course of contract negotiations with the Board, the Association adopted the following resolution:

> "Be it resolved that the teachers of District #131 will not return to the classroom in the fall if there is at [that] time no satisfactory settlement of the contract between the Board of Education and the AEAE and further that an open meeting be held on September 2 for all teachers to assess the position of the AEAE at that time" (Pet. App. 4a-5a).

The Board thereupon discontinued negotiations with the Association and wrote each teacher a letter proffering an individual contract for the 1971-72 school year. The

proffered contracts provided that the contracting teacher expressly agreed that

> "[b]y urging, advocating, recommending, and asserting the right to strike by its members . . . on June 9, 1971, the AEAE no longer qualifies as the organization that, under the established School Board Policy (1.30 Article II) [is] a bargaining representative of the teachers of the school system, and accordingly will not be recognized by the School Board as such agent for the teachers" (Pet. App. 5a).

Board Policy 1.30 purports to exclude from representation rights "any organization which asserts the right to strike against any . . . agency of the government, or to assist or to participate in any such strike, or which imposes a duty or obligation to conduct, assist, or participate in any such strike . . ." (Pet. App. 5a).

Although many other teachers accepted the proffered contracts, the seven individual respondents did not and in consequence were required to teach during the 1971-72 school year on the 1970-71 terms. Accordingly, the seven teachers and the Association commenced this action in the District Court. (Pet. App. 5a-6a.)

In their complaint, respondents claimed that the Board's actions violated their rights under the due process clause of the Fourteenth Amendment as it incorporates the principles of the First Amendment. In addition, they claimed that the Board's actions violated their rights under 42 U.S.C. § 1983. They therefore sought a declaration that School Board Policy 1.30 is invalid as applied and that they are entitled to the same pay and benefits as other teachers; injunctive relief against continued violations of their rights; back pay based on the 1971-72 schedule; actual and exemplary damages; and attorneys' fees and costs. (Pet. App. 6a.)

Petitioners moved to dismiss the complaint on three grounds—(1) that the complaint failed to state a valid

claim; (2) that petitioners are not subject to suit under 42 U.S.C. § 1983; and (3) that the Association is not a proper plaintiff to assert the claims alleged under Section 1983 (Pet. App. 6a).

The District Court dismissed the complaint for failure to state a valid claim (Pet. App. 6a). On appeal the Court of Appeals reversed, holding that "Policy 1.30 seeks, *inter alia*, to prohibit constitutionally permissible free speech," and therefore, "because of its overbreadth," is "violative of the due process clause of the Fourteenth Amendment" (Pet. App. 7a). Petitioners have not asked this Court to review that determination (Pet. 9).

As noted above, however, petitioners had moved to dismiss on two additional grounds, one of which was their claim that they are immune from suit under Section 1983. In their brief on appeal, petitioners urged this contention upon the Court of Appeals, asserting that it justified dismissal of the complaint. A copy of the relevant section of petitioners' brief in the Court of Appeals is reproduced in Appendix A to this brief. Respondents replied in their reply brief and following this Court's decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), called that decision to the attention of the Court of Appeals by letter, a copy of which is reprinted in relevant part in Appendix B hereto. The Court of Appeals rejected petitioners' contention, stating—

> "Defendants suggest miscellaneous grounds, not relied upon by the District Court, which they argue could have supported its dismissal of the complaint.
>
> "We note that at least one of the points pressed by defendants is unsound. The Board is not a municipal corporation and in that capacity outside the coverage of 42 U.S.C. § 1983, as construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961)" (Pet. App. 8a).

Petitioners seek to have this Court review that determination. After filing their petition for certiorari,

petitioners filed a new motion to strike and dismiss in the District Court with a supporting memorandum in which they renewed their contention that the Board is immune from suit under Section 1983 and stated that the statement of the Court of Appeals quoted above, which they have asked this Court to review, is a "mere dictum and not binding on this [district] court."

ARGUMENT

There is no occasion for review by this Court. It is not true that petitioners were not "given an opportunity to argue or brief the issue" (Pet. 11) as to which they seek review; they tendered that issue to the Court of Appeals for decision in their brief on appeal below. The decision below does not conflict with applicable decisions of this Court or with decisions in other circuits cited by petitioners. The claim that this Court should grant certiorari because "the Court below has decided an important question of state law in direct conflict with the applicable statutes of the State of Illinois and the opinions of the Illinois courts construing state law" (Pet. 15) presents only a question of Illinois law as to which petitioners are incorrect. And even if the question petitioners seek to present were otherwise worthy of review, review at this interlocutory stage of the proceedings would be inappropriate, because, among other reasons, the question presented may well prove to be academic in this case.

1. It is important at the outset to dispel the incorrect claim that the Court below "gratuitously" decided the issue as to which petitioners seek review without giving petitioners the opportunity to be heard (Pet. 11, 16-17).

Petitioners assert that "[n]either the petitioners nor the respondents herein were given an opportunity to argue or brief the issue which the Court of Appeals gratuitously decided" (Pet. 11). They go on to claim

that the question "whether the School Board is a 'person' under § 1983 was not at issue on the appeal before the Court of Appeals" (Pet. 16). They represent that the "plaintiffs-respondents did not brief or argue this point nor did we" (Pet. 16). They contend that this alleged departure "from the accepted and usual course of judicial proceedings" (Pet. 11, 16) denied them "due process" (Pet. 11) and "calls for an exercise of this Court's power of supervision" (Pet. 11, 16). They conclude that they "should at least be given the opportunity to advance their arguments in the court below on remand" (Pet. 17).

The fact is that in Part IV of their brief in the court below, petitioners tendered and briefed the issue about which they now complain (App. A). Respondents answered on pages 8-11 of their reply brief. After this Court decided *City of Kenosha* v. *Bruno*, *supra*, respondents called that decision to the attention of the Court of Appeals (App. B). In addition, petitioners reiterated their claim at length in a petition for rehearing which was denied. Thus, petitioners' claims in this regard simply do not square with the facts.

2. Contrary to petitioners' contentions, the decision below is not in "direct conflict with the applicable decisions of this Court," which are said to be *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); and *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. 507 (1973). Those three decisions held that *cities* and *counties* are immune from suit under Section 1983. They did not involve *boards of education* and thus there is no "direct conflict with the applicable decisions of this Court."

The considerations that affect the question of the immunity of cities and counties are different from those that affect the question of possible immunity of school districts and certainly of boards of education. The relevant legislative history—the rejection of the Sherman

Amendment summarized in *Monroe* v. *Pape, supra*, 365 U.S., at 187-190—concerned the proposed imposition of liability on "the inhabitants of *the county, city or parish*" for acts of violence by persons over whom the inhabitants have no control. *Id.*, at 188. The Amendment did not involve the problems of school districts, and certainly has no relevance to the question whether a board of individuals, who themselves are subject to suit under Section 1983,[1] can be sued for its actions. Such actions are governed, not by *Monroe, Moor* and *Kenosha*, but by the many decisions of this Court authorizing relief under Section 1983 against local boards of education.[2]

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[1] See *Scheuer* v. *Rhodes*, No. 72-914 (U.S., April 17, 1974) (Slip op. 3-4, 5-6); *Edelman* v. *Jordan*, 42 U.S.L.W. 4419, 4427 (March 25, 1974). The holdings in *Monroe, Moor*, and *Kenosha* were based on legislative history which indicated explicitly that cities and counties were exempt from suit under Section 1983 while officials acting for those entities were not. See, *e.g.*, *Monroe, supra*, 365 U.S. at 175-77, 190-91; *Moor, supra*, 411 U.S. at 708 n.24; *City of Kenosha, supra*, 412 U.S. at 512, 514. Thus, in *Kenosha*, the Supreme Court emphasized that "the only defendants named in the complaints . . . were . . . municipalities," and limited its holding to municipalities (412 U.S. at 512, 514). In *Ex parte Young*, 209 U.S. 123, 159-60 (1908), this Court held that government officials can be sued even when the governmental entities they represent are immune from suit under the Eleventh Amendment. The same principle has been followed in numerous decisions under Section 1983, most recently in *Scheuer, supra*. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Donahue* v. *Stanton*, 471 F.2d 482 (7th Cir., 1972); *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319, 323 (5th Cir., 1970); *Diamond* v. *Pitchess*, 411 F.2d 565 (9th Cir., 1969); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir., 1968); *Board of Trustees of Arkansas A. & M. College* v. *Davis*, 396 F.2d 730, 734 (8th Cir., 1968).

[2] This is clearly demonstrated by two decisions handed down since *Kenosha* in which the Court allowed relief under Section 1983 aganst boards of education. *Cleveland Board of Education* v. *LaFleur*, 42 U.S.L.W. 4186, 4187, 4188 (Jan. 21, 1974); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) (see 445 F.2d 990, 994; 303 F. Supp. 289, 296). For decisions prior to *Kenosha* which also authorized relief in such cases, see, *e.g.*, *Papish* v. *Board of Curators*

3. Petitioners claim that the holding below conflicts with decisions in the Second, Fifth and Ninth Circuits (Pet. 14). However, those decisions do not hold that local boards of education cannot be sued under Section 1983, and thus there is no conflict.

Petitioner rely on *Blanton* v. *State University of New York*, 489 F.2d 377 (2d Cir., 1973), from the Second Circuit. In that case the Court of Appeals held that a state university cannot be sued under Section 1983. That holding concerns the question whether Congress intended *states*, and therefore *state* agencies, to be immune from suit under Section 1983. That question involves considerations akin to those that underlie the Eleventh Amendment, which bars suits against the states but not against local governmental subdivisions. See *Edelman* v. *Jordan*, 42 U.S.L.W. 4419, 4424 n. 12 (March 25, 1974). Those considerations were not involved in the battle over the Sherman Amendment concerning cities, counties and parishes. Thus, the question of state immunity under Section 1983 is quite different from the question presented here—whether a *local* board of education is immune from suit under Section 1983.

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of the University of Missouri, 410 U.S. 667, 668-69 (1973); *Raney* v. *Board of Education*, 391 U.S. 443 (1968) (see 381 F.2d 282, 283); *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683 (1963) (see 301 F.2d 164, 165); *McNeese* v. *Board of Education, School District 187*, 373 U.S. 668, 671-72 (1963). See also, Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Acts*, 45 So. Calif. L. Rev. 131, 152-55 (1972); *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 57, 258-60 (1973).

We note that this Court often makes distinctions among governmental entities based upon an analysis of the nature and powers of the different entities and the statutory or constitutional goals at stake. *E.g.*, *Salyer Land Company* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719, 726-30 (1973) (distinguishing for "one-man, one vote" purposes between governmental subdivisions with only "limited authority" and others with "general" authority); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98 (1972) (holding that "the term 'States' as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political subdivisions").

Petitioners rely on three decisions from the Fifth Circuit—*Campbell* v. *Masur*, 486 F.2d 554 (5th Cir., 1973); *Butts* v. *Dallas Independent School District*, 436 F.2d 728 (5th Cir., 1971); and *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319 (5th Cir., 1970). *Butts* and *Harkless* were decided before this Court's decisions last term in *Moor* and *Kenosha*, while *Campbell* is more recent. In *Butts* and *Harkless*, the Court of Appeals held that school districts in Texas can be sued for equitable relief under Section 1983, although it did state that such districts could not be sued for damages because they are "in the nature of" municipalities. (427 F.2d, at 321; see 436 F.2d, at 729.) The statements as to suits for damages concerned suits against school districts, *i.e.*, political subdivisions, not boards of education, and in any event were dicta. Moreover, the Court of Appeals' view that school districts in Texas were "in the nature of" municipalities was specifically based on an analysis of Texas law. 427 F.2d, at 321. More recently, in *Campbell*, the Court of Appeals was presented with the question whether a school district in Texas can be sued under Section 1983 for wrongful discharge. Instead of deciding the question itself, the Court remanded the case for reexamination in the light of *Kenosha*. Thus, the Fifth Circuit has not yet resolved the question of immunity of school districts under Section 1983 and has not even considered the question petitioners seek to present—the possible immunity of *boards of education*. Accordingly, the decision below does not conflict with the Court of Appeals' decisions in the Fifth Circuit.

Finally, petitioners rely on *Harvey* v. *Sadler*, 331 F.2d 387 (9th Cir., 1964), a pre-*Kenosha* decision in the Ninth Circuit. In that case, the Court of Appeals held that a California school district cannot be sued for damages under Section 1983. The Court of Appeals did not decide, however, whether a *board of education* can be sued

under Section 1983, and thus there is no conflict between that decision and the decision below. As discussed above, school districts—political subdivisions—are different from boards of education, the bodies of individuals who govern such districts.

Thus, the holding below that a board of education in Illinois is subject to suit under Section 1983 does not conflict with decisions in other circuits cited by the petitioners.

4. Petitioners contend further that the "court below has decided an important question of State law in direct conflict with the applicable statutes of the State of Illinois and opinions of the Illinois courts construing State law" (Pet. 15). There are no Illinois state court decisions as to the amenability of boards of education to suit under Section 1983, and therefore there could not possibly be a "direct conflict" between Illinois state court decisions and the decision below. The contention that this Court sits to review questions of Illinois law requires no response. See Stern & Gressman, Supreme Court Practice, § 4.10 (4th ed., 1969). We note, moreover, that petitioners rely on two Illinois statutes of very limited application and fail to call the Court's attention to much more important provisions in the Illinois Code. Thus, they cite a provision in the Illinois Tort Immunity Law that treats school districts as "local public entities" for purposes of tort immunity only (Ill. Rev. Stat., ch. 85 § 1-206). They also cite a section in the Illinois Municipal Code that provides for the joint exercise of powers by "municipal corporations or governmental subdivisions or districts," and that states that "*in this section* 'municipal corporations or governmental subdivisions or districts' includes municipalities, townships, counties," and various governmental districts including "school districts" (Ill. Rev. Stat., ch. 24 § 1-1-5, emphasis added). However, petitioners are silent about the provisions of the same

Illinois Municipal Code that are of general application. Those provisions state that "unless the context otherwise provides 'municipal' or 'municipality' does not include a . . . school district" (Ill. Rev. Stat., ch. 24 § 1-1-2(1)). Thus, petitioners' unqualified assertion that boards of education are municipal corporations under Illinois law is not accurate. Boards of education differ from municipal corporations under Illinois law in important ways.[3]

5. There are at least two reasons why the question petitioners seek to present may well prove to be academic in this case, and thus why the decision below does not warrant review, certainly at this interlocutory stage of the proceedings. In the first place, the individual members of the Board of Education have all been named as defendants. Therefore, even if the holding below as to the Board were reversed, respondents may obtain much and perhaps all the relief they seek by way of a judgment against the Board's individual members. See n. 1, *supra*. In the second place, a holding that the Board cannot be sued under Section 1983 would not mean that the complaint against the Board should be dismissed. Even if respondents were held to lack a cause of action against the Board under Section 1983, the claim that the Board violated respondents' constitutional rights is within the jurisdiction of the District Court under 28 U.S.C. § 1343(3).[4] And even if that were not true, respondents

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[3] Compare Illinois School Code, Ill. Rev. Stat., ch. 122, which prescribes the duties and powers of boards of education (§§ 10-10, 10-20 et seq., 10-21 et seq.), with Illinois Municipal Code, Ill. Rev. Stat., ch. 24, which prescribes the duties and powers of municipal corporations.

[4] 28 U.S.C. § 1343(3) grants District Courts jurisdiction over "any civil action authorized by law . . . [t]o redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." This Court has recognized that the Constitution may give rise directly to causes of action for monetary and equitable remedies for constitutional violations. *E.g.*,

nevertheless may establish jurisdiction under 28 U.S.C. § 1331. *E.g.*, *City of Kenosha* v. *Bruno*, *supra*, 412 U.S., at 514.[5]

In these circumstances, the case is not ripe for review. After rejecting petitioners' contention that petitioner Board of Education cannot be sued under Section 1983, the court below sent the case back to the district court for a determination of the remaining issues presented by the motion to dismiss, and the ultimate merits of the case if the motion is denied. Therefore, the question whether respondents can sue petitioner Board of Education under Section 1983 may well be moot when a final judgment is entered. In cases in this posture, this Court grants review only for exceptional reasons, none of which exist in this case. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967)

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971); *Bell* v. *Hood*, 327 U.S. 678 (1946). Thus, even if petitioners are right in contending that respondents lack a cause of action against the Board under Section 1983, respondents nevertheless have pleaded a cause of action under the Constitution, within the jurisdiction of the District Court under Section 1343(3). See *Moyer* v. *Peabody*, 212 U.S. 78, 83 (1909) ("the question is whether this is a suit authorized by law, that is by [Section 1983] or the Constitution, or both").

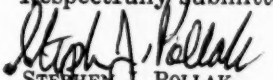
[5] The complaint does not state that the jurisdictional amount required by § 1331 is met. However, both the respondent Association and the respondent teachers have suffered monetary damage as a result of petitioners' actions (see App. B, pp. 6a-7a, *infra*), and the constitutional interests asserted by the petitioners—the invaluable rights of speech and assembly—are worth more than $10,000. See *Spock* v. *David*, 469 F.2d 1047, 1052-53 (3d Cir., 1972); *Cortwright* v. *Resor*, 325 F. Supp. 797, 810 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir., 1971); *West End Neighborhood Corp.* v. *Stans*, 312 F. Supp. 1066, 1068 (D.D.C., 1970). In these circumstances, at this pretrial stage of the proceedings, leave to amend to allege jurisdictional requisites should be freely granted under F.R.C.P. 15(a). *E.g.*, *United Steelworkers* v. *Mesker Bros. Industries, Inc.*, 457 F.2d 91, 93 (8th Cir., 1972); 3 Moore, Federal Practice, ¶ 15.09 (2d ed., 1974); see also *Eklund* v. *Mora*, 410 F.2d 731 (5th Cir., 1969); 3 Moore, *supra*, ¶ 15.11, at 969.

("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); Stern & Gressman, Supreme Court Practice, § 4.19 (4th ed., 1969).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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